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73646—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1193

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DIRE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, reversing the conviction of respondent on the ground that counterfeit ration coupons introduced in evidence against him were obtained as the result of an unlawful search.

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 64–70) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 3, 1947 (R. 70), and rehearing was denied March 14, 1947 (R. 72). On March 5, 1947, the Government's time to file a petition for a writ of certiorari was extended by order of Mr. Justice Jackson to April 4, 1947.[1] The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether, when officers have been informed that contraband is to be transferred at a certain place, and their observations reasonably justify the conclusion that a transfer has taken place in an automobile at such place, they are justified in searching and arresting a third person present in the automobile about whom they had no previous information.

STATEMENT

Respondent was convicted in the United States District Court for the Western District of New York on an indictment in one count charging him

[1] The extension of time to file a petition for a writ of certiorari was requested because the Government's application for rehearing was made beyond the period fixed by the rules of the Circuit Court of Appeals for the Second Circuit. However, the denial of that application was on the merits.

with knowingly possessing a quantity of counterfeit gasoline ration coupons (R. 4–5, 56). He was sentenced to imprisonment for one year and to pay a fine of $100; execution of the fine was suspended (see R. 57). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed on the ground that counterfeit ration coupons introduced in evidence against respondent were obtained as the result of an unlawful search (R. 64–67, 70). Judge Clark dissented (R. 67–70).

Respondent did not move before trial to suppress the coupons, which had been taken from his person. However, at the trial, when the coupons were offered in evidence in the course of the testimony of a detective of the Buffalo Police Department as to the circumstances under which the coupons were obtained, respondent moved to exclude them on the ground that his arrest and search were illegal (R. 8–10). Government counsel suggested that a preliminary examination would be out of order until the witness had concluded his testimony (R. 9–10). The detective and an O. P. A. investigator who accompanied him testified as to the circumstances under which respondent had been searched (R. 10–28). Thereafter, the trial judge dismissed the jury and heard argument on the admissibility of the coupons (R. 29). No question was raised as to the timeliness of the motion to suppress, but both sides

argued the validity of the search (R. 29–31). The trial judge ruled that he would admit the coupons in evidence (R. 31–32).

The circumstances under which the coupons were obtained, as developed by the testimony of the detective and the O. P. A. investigator, may be summarized as follows:

A man named Reed informed the investigator that one Buttitta was to sell him ration coupons at a place known as the Deco Stand (R. 13, 23). The investigator and the detective caught sight of Buttitta's car, followed it, and some minutes later saw it parked at the Deco Stand (R. 13, 23). They approached the car and found Buttitta in the driver's seat, respondent beside him, and Reed in the back seat (R. 7, 13). Reed had two coupons in his hand (R. 7, 14, 23), which at the trial were shown to be counterfeit (R. 23, 38). Reed said the coupons had been given to him by Buttitta (R. 7, 14, 23). The detective felt the outside of the clothing of all three men to see if they carried weapons (R. 14, 24), and then took all three to the police station (R. 8, 15, 24). The detective testified that he took respondent to the station "for questioning about the stamps" (R. 15). At the station, respondent was told to lay his possessions on the table, and he then produced two gasoline ration coupons and several fuel oil coupons, stating that he had found them on the street (R. 8–9, 19, 24). Respondent was "booked" about two hours later, and then thor-

oughly searched, at which time an envelope containing 100 inventory gasoline ration coupons was found concealed between his shirt and underwear (R. 10–11, 21–22). Both the two gasoline coupons first produced and the 100 coupons found in the envelope proved to be counterfeit (R. 9–10, 11, 38).

The majority of the circuit court of appeals held that respondent's presence in the car did not constitute probable cause for believing that he was a party to the conspiracy between Buttitta and Reed, and hence that there was no probable cause for his arrest and for the search of his person incident to such arrest (R. 64–67).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that the counterfeit ration coupons were inadmissible in evidence.

(2) In holding that the police officer did not have probable cause to search respondent's person when he was found in a vehicle used to carry contrabrand.

(3) In holding that there was insufficient probable cause for the arrest of respondent.

(4) In reversing the judgment of conviction.

REASONS FOR GRANTING THE WRIT

The action of the police officer in taking respondent to the station after he had been found in a car used as a rendezvous for the commission of a crime, searching him, and holding him

after he was found to be carrying a quantity of counterfeit ration coupons was, we submit, a reasonable, precautionary, law enforcement measure. And since the legality of a search or of an arrest depends, essentially, on its reasonableness, the result reached in the decision below, in labelling as unreasonable measures reasonable on their face, in itself casts doubts on the validity of the reasoning underlying the decision. It is our position that the search of respondent may be justified on two grounds—either as incident to a search of a vehicle reasonably believed to be carrying contrabrand, or as incident to a valid arrest—and that, in holding the search unreasonable, the court below disregarded controlling decisions of this Court in a manner which will unduly hamper law enforcement officers.

1. As we pointed out in our petition for rehearing in the court below (R. 71), the search of respondent may be justified, without regard to the validity of his arrest, under the principle enunciated by this Court in *Carroll* v. *United States*, 267 U. S. 132, and *Husty* v. *United States*, 282 U. S. 694, that a vehicle may be searched by officers having reasonable cause to believe that it is being used to carry contrabrand.

In the instant case, the undisputed facts establish that the officer who searched respondent had reasonable cause to believe that the automobile in which he was found was being used to carry contraband—counterfeit gasoline ration coupons.

Hence, under the cases cited, the officer had a right to stop and search the car. The right to search was not lost merely because the car was stationary at the time the officer approached it. *Scher* v. *United States*, 305 U. S. 251, 255.

Since, therefore, a search of the car would clearly have been proper, a search of the occupants of the car was, we submit, also proper under the circumstances of this case. We have found no authority dealing specifically with the question of the right to search the occupants of a car thought to be carrying contraband, but common sense demands that such right exist in a case such as this where the contraband sought is a small article which could easily be concealed on the person. We do not suggest that where officers have information that a vehicle is being used to carry gallon jugs, they may justify a search of an individual's pockets on such ground without a valid arrest of the person. But where, as here, the contraband sought is of such a nature that it could easily be concealed on the person, could even be slipped into the pockets of a passenger in the car without his knowledge, then a right to search the automobile without a right to search the occupants of the automobile would very frequently be meaningless. Reported decisions have assumed, without discussion, that the right to stop and search an automobile includes the right to take contraband from a person in the car. See *Stobble* v. *United States*, 91 F. 2d 69, 70 (C. C. A. 7),

where an envelope believed to contain heroin was taken from the defendant while she was sitting in a parked car; *Cassidy* v. *United States*, 49 F. 2d 504, 505 (App. D. C.), where a pint bottle of liquor was taken from the defendant's hip pocket at the time his car was searched. While, in both these cases, the persons from whom the contraband was taken were subject to arrest, the taking of the articles was treated in the decisions as part of the search of the vehicle. Considering the nature of the offending instruments sought in the instant case, we submit that the officer had the right to search the occupants of the automobile as well as the automobile itself.

The fact that the search of appellant's person was conducted at the station house rather than at the place where the car was parked does not, we think, affect its validity under the foregoing principles. If the officer had a right to search at all, he had a right to make as thorough a search as was necessary to uncover the type of contraband sought. Cf. *Matthews* v. *Correa*, 135 F. 2d 534, 537 (C. C. A. 2). And, manifestly, a public street is not a place in which a thorough search of a person's clothing can reasonably be conducted. It was therefore reasonable, and by the same token proper, to take the occupants of the automobile to a place where the search of their persons could be conducted effectively. In *Coupe* v. *United States*, 113 F. 2d 145 (App. D. C.), certiorari denied, 310 U. S. 651, officers who

had reason to believe that an automobile was being used to carry policy slips took the car to police headquarters before searching it (see 113 F. 2d at p. 146). Their right to do so was assumed in an opinion by Mr. Justice Rutledge. So here, the automobile and its occupants could properly have been taken to headquarters and there searched. That the occupants alone were taken without the car does not seem to us a factor of importance in determining the validity of the search.

2. Even if it be deemed necessary to justify the search of respondent at the police station on the basis of a valid arrest, then, we submit, for the reasons set forth in the dissenting opinion below (R. 67–70), probable cause existed for the arrest. As Judge Clark stated in his dissent, "Police officers cannot be held unreasonable in declining to view as a mere by-stander one who accompanies a criminal to a crime rendezvous" (R. 67).

Although giving lip service to the recognized rule that the test of the legality of an arrest is whether the arresting officer has reasonable cause to believe that a felony has been committed and that the person arrested has committed it, the majority of the court below actually applied a test which would be appropriate in determining guilt or innocence at a trial. The rule of substantive guilt—that mere knowledge is not sufficient to establish membership in a conspiracy—does not seem to us to require a holding that

police officers are not justified in assuming that a person present at a pre-arranged rendezvous for the commission of a crime has some complicity in the venture, either as a co-conspirator, or as an aider and abettor. This Court has frequently reiterated the rule that actual guilt need not be established to show probable cause, that it is sufficient if the officer acts upon reasonable grounds to believe that the person arrested is guilty of an offense. *Carroll* v. *United States*, 267 U. S. 132, 161, and cases there cited. These decisions were disregarded by the court below in applying to the validity of the arrest the standards of substantive guilt.

The effect of the decision below is to place a wholly unreasonable burden on law enforcement officers. In actual practice, it frequently happens that officers receive information as to planned meetings for the perpetration of crime in which only one or two of the participants are identified. It is unrealistic to hold that others present at the scene but not theretofore identified are immune from arrest. This is particularly true in liquor and narcotics cases, where agents often receive information merely that a certain automobile will be carrying the contraband at a particular time. Surely, when a car is stopped and found to be carrying contraband liquor or narcotics, the agents have reasonable basis for arresting all the occupants of the car. Decisions in cases involving such factual situations have

assumed without question the validity of such arrests. *Kaiser* v. *United States*, 60 F. 2d 410 (C. C. A. 8), certiorari denied, 287 U. S. 654; *Hawthorne* v. *United States*, 37 F. 2d 316 (C. C. A. 4); *United States* v. *Wiggins*, 22 F. 2d 1001 (D. Minn.); *United States* v. *Stafford*, 296 Fed. 702 (E. D. Ky.). Under the decision below, however, unless the arresting officers have information identifying the persons involved, they would have no basis for arresting persons other than the driver. Such a holding, we submit, invites major criminals to avoid arrest by the simple expedient of having an employee drive the automobile.

CONCLUSION

The decision below is contrary to established principles governing the search of motor vehicles and the arrest of persons reasonably believed to have committed a crime. It can, we believe, prove of serious embarrassment to law enforcement officers in important fields of Federal criminal jurisdiction. We therefore respectfully submit that the petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947